



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

June 8, 1995

Ms. Suzanne Giesecke Zarling  
Assistant General Counsel  
Texas Department of Agriculture  
P.O. Box 12847  
Austin, Texas 78711

OR95-371

Dear Ms. Zarling:

The Texas Department of Agriculture (the "department") has asked whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. The request was assigned ID# 31840.

*The department received the following request for information:*

I realize that weights and measures officials routinely check stores concerning misrepresentation of prices and respond to customer complaints on the issue. Since those reports are a matter of public record, I'm requesting that your office supply me with any pricing inaccuracy complaints involving Wal-Mart and copies of regular inspections of Wal-Marts in Texas checking prices for accuracy during the past twenty-four months.

I would also ask that your office furnish me with copies of any documentation you have in regard to citations or judgments against Wal-Mart.

You assert that some of the requested information is excepted from disclosure pursuant to section 552.103(a).<sup>1</sup>

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<sup>1</sup>Since the request asks for a broad range of information, and you have asserted an exception for only certain documents, we assume that you either do not have other records or that you have already released other documents.

To show the applicability of section 552.103(a), a governmental entity must show that the requested information is related to pending or reasonably anticipated litigation. *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 (1990) at 4. For purposes of section 552.103(a), this office considers a contested case under the Administrative Procedure Act, chapter 2001 of the Government Code, to be litigation. Open Records Decision No. 588 (1991) at 7.

You state that the department investigates consumer complaints of price misrepresentations pursuant to section 13.002 of the Agriculture Code, which provides:

The department shall enforce the provisions of this chapter and shall supervise all weights and measures sold or offered for sale in this state. The department may purchase apparatus as necessary for the administration of this chapter.

Chapter 13 concerns weights and measures<sup>2</sup> and the sale of certain goods by weight and measure. Agriculture Code sections 12.020 and 13.007 provide that violations of chapter 13 may result in administrative penalties of up to \$500 for each day that a violation continues. You submitted what appears to be inspection reports from various stores showing price or quantity misrepresentations. You submitted information showing that as to complaint number 2310-95-3-0013, the department has already notified the store of alleged violations and set a date for an administrative hearing. We assume from your letter that the legal department has made a preliminary determination that the other reports also show violations of the law and that the inspected stores will be notified and administrative hearings set.

Under these circumstances, you have shown that litigation is reasonably anticipated as to each of the alleged violations. Our review of the records at issue indicates that the records at issue are related to each respective anticipated litigation. However, you may not withhold some of the investigation records at issue. Absent special circumstances, once all parties to anticipated litigation have had access to the information at issue, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Some of the records have already been disclosed to the stores that will be the opposing parties in the respective suits. We have marked the records that must be disclosed, but note that if other information has already been disclosed to the opposing parties it also must be released to the requestor.

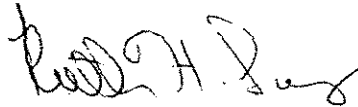
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<sup>2</sup>The department by rule provides that weights, measures, and measures devices includes "all weights, scales, beams, measures of every kind, also all instruments and mechanical devices for weighing or measuring, and any appliances and accessories connected with any or all such instruments." 4 T.A.C. § 15.5.

The information at issue that has not previously been disclosed may be withheld from disclosure under section 552.103(a). The applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982) at 3. Also, since the section 552.103(a) exception is discretionary with the governmental entity asserting the exception, it is within the department's discretion to release this information to the requestor. Gov't Code § 552.007; Open Records Decision No. 542 (1990) at 4.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination under section 552.301 regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Ruth H. Soucy  
Assistant Attorney General  
Open Government Section

RHS/rho

Ref.: ID# 31840

Enclosures: Marked documents

cc: Ms. Mary Bach  
Consumer Advocate  
P.O. Box 377  
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(w/o enclosures)